2009

The State of Utah v. Zachery Don Zaelit : Brief of Appellant

Utah Court of Appeals

Mark L. Shurtleff; Utah Attorney General; Counsel for Appellee.
Linda M. Jones; Heather Chesnut; Attorneys for Defendant .

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
ZACHERY DON ZAELIT,	:	Case No. 20090405-CA
Defendant/Appellant.	:	Appellant is incarcerated

BRIEF OF APPELLANT

Appeal from a conviction of theft by receiving stolen property, a second degree felony offense under Utah Code Ann. §§ 76-6-408 and 76-6-412(1)(a)(ii) (2008), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Stephen Roth, presiding.

LINDA M. JONES (5497)
HEATHER CHESNUT (6934)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Defendant/Appellant

MARK L. SHURTLEFF (4666)
UTAH ATTORNEY GENERAL
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorney for Plaintiff/Appellee

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(e) (2008). The trial court entered judgment and conviction against Appellant Zachery Zaelit for theft by receiving stolen property, a second degree felony offense under Utah Code Ann. §§ 76-6-408 and 76-6-412(1)(a)(ii) (2008). The judgment is attached as Addendum A.

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Whether the State's evidence for the verdict was insufficient where it relied on uncorroborated, unsworn, inconsistent, out-of-court statements.

Standard of Review: Where evidence is insufficient, this Court will reverse the conviction. A sufficiency issue is reviewed as follows:

> [W]e review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he

was convicted. *State v. Petree,* 659 P.2d 443, 444 (Utah 1983) (citing numerous cases). An observation made by this court in *Petree* bears repeating here:

> [N]otwithstanding the presumptions in favor of the jury's decision this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

State v. Shumway, 2002 UT 124, ¶ 15, 63 P.3d 94 (citing *Petree*, 659 P.2d at 444-45).

Preservation: The issue is raised under the plain-error doctrine. *See State v. Holgate*, 2000 UT 74, ¶ 13, 10 P.3d 346. This Court may review a sufficiency claim for plain error to avoid injustice. *See id.*

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following provisions are relevant to the issue on appeal and set forth at Addendum B: Utah Code Ann. §§ 76-2-202, 76-6-408 (2008); Utah R. Evid. 801 (2009).

STATEMENT OF THE CASE

Nature of the Case, Course of the Proceedings, Disposition in the Court Below

On July 25, 2008, the State filed an Information against Zaelit, Justin Llewelyn, and Britnee Emery for theft by receiving stolen property. (R. 1-3). On August 26, 2008, the court conducted a preliminary hearing and bound Zaelit over for trial on the charge. (*See* R. 27-28). On February 25, 2009, the court presided over a jury trial. (*See* R. 88-91). At the conclusion, the jury found Zaelit guilty as charged. (R. 120). On April 14, 2009, the trial court sentenced Zaelit to an indeterminate term at the Utah State Prison of

one to fifteen years. (R. 128-29). On May 12, 2009, Zaelit filed a notice of appeal. (R. 133). The appeal is timely. Utah R. App. P. 3 and 4 (2009). Zaelit is incarcerated.

STATEMENT OF FACTS

On July 21, 2008, Christine Armstrong woke early in the morning and discovered that her 1997 Toyota Camry was gone from her apartment complex at 3334 South 825 East. (R. 143:51-52). She had last seen the car the night before. (R. 143:52). Armstrong contacted the dealership and authorities. (R. 143:52-53). The dealership engaged the GPS tracking device in the car and was able to track its location. (R. 143:53). The car was in West Jordan in a driveway for a trailer home at 1268 West 7055 South. (R. 143:53-55). Armstrong found items in the car that did not belong to her. (*Id.*) Also, her license plates were gone. (R. 143:56). Armstrong did not see who took the car. (R. 143:56).

On July 21, authorities executed a search warrant at the trailer home. (*See* R. 143:58). Technician Francine Bardole took inventory of a license plate in a southwest bedroom there. (R. 143:60-61; *see also* R. 143:61-63 (stating Bardole did not find the license plate and could not say where it was originally found)).

Also, authorities took four people in custody from the trailer home and interrogated them at the police department. According to agents, three of the suspects implicated Zaelit in the theft. Agent David Olive interviewed Justin Llewelyn. (R. 143:126). Olive testified that Justin appeared to understand questions during the interrogation, and he gave appropriate responses, although the responses were "a little vague here and there." (R. 143:126-27). Olive reported that Justin first saw the Toyota Camry parked at the trailer home the night before. (*Id.*) The license plate was missing

and his friends were inside the trailer. (*Id.*) Justin came to the conclusion that the vehicle was probably stolen. (*Id.*)

When Olive told Justin that a crime unit was processing the vehicle for prints, Justin changed his story. He "admitted that he was in the vehicle and that he had driven the vehicle." (R. 143:128). Justin refused to make a written statement: "he was afraid that Zachery [Zaelit] would see and read" it. (R. 143:128, 131). Later Justin changed his story again. He told Olive that Zaelit "was driving the vehicle" and Justin, Copper Hinton, and Britnee Emery were passengers. (R. 143:129). At some point Zaelit pulled the car off the road and Justin drove. (R. 143:129). Also, Zaelit took the group to the apartment complex for the Toyota. (R. 143:130). Notably, Olive did not have fingerprint information from the car: he "exaggerated" to get a confession. (R. 143:138).

Next, Detective Kaer testified that he interviewed Copper Hinton at the police department. She claimed that she and Britnee Emery drove Zaelit and Justin around for a while, "then they went over to an apartment complex." (R. 143:144). Justin and Zaelit got out of Britnee's car and drove the stolen vehicle. (R. 143:144). Justin and Zaelit followed Copper and Britnee to the trailer home in West Jordan. (R. 143:145; *but see* R. 143:149 (stating Copper and Britnee followed Justin and Zaelit)).

Kaer also interviewed Britnee Emery. Her information was "slightly different." (R. 143:148). She and Copper "went and picked up both Justin and Mr. Zaelit, they went up in the area of 39th and 9th and they got into a car, and went back over to the place [the trailer home] in West Jordan." (R. 143:148). They may have made other stops. (R.

143:149). According to Kaer, Britnee and Copper were both "honest right down to the drugs" they used. (R. 143: 150); *but see* *State v. Rimmasch*, 775 P.2d 388, 407 (Utah 1989) (ruling that testimony going to truthfulness is inadmissible). Kaer also acknowledged that "people lie to me." (R. 143:155). "[I]t's not uncommon for people to lie to the police." (R. 143:155).

Copper, Britnee, and Justin denied the officers' accounts at trial. Copper testified that on July 20, she was with Britnee, Justin, and Zaelit. (R. 143:66). She and Britnee picked up Justin and Zaelit at 3900 South and 700 East at 11:00 p.m. and they drove to the trailer home. (R. 143:66). She recalled that before going to the trailer, they stopped at some apartments, Justin and Zaelit got out of the car "for a brief moment," they "got back in [the car]" with Britnee and Copper, and they all went to the trailer home in Britnee's car. (R. 143:69, 70, 71, 76). The four spent "most of the time" in a bedroom, and at some point Justin and Copper went into the living room while Britnee and Zaelit slept. (R. 143:79, 83). The next morning, police arrived and transported them to the police department for questioning. (*See* R. 143:78, 79).

Copper testified she was on drugs the night in question and did not remember details. (R. 143:67-68; *see also* R. 143:75-76). She did not recall telling officers that Justin and Zaelit got out and drove away in the stolen car. (R. 143:72). Also, Copper testified that when she spoke to Kaer she was "really high and I'm sure I would have said anything to get out of that [interrogation] room." (R. 143:74; *see also* R. 143:80, 81).

Britnee's testimony was similar. She testified that she and Zaelit had been seeing each other, and they were in a fight that night. (R. 143:85-86). She drove Copper, Justin, and Zaelit in her car. (R. 143:87-88 (stating she borrowed her car from a friend)). At some point, Justin left, and they all ended up at the trailer. (R. 143:91).

She could not remember the details because she was on heroin and meth. (R. 143:88, 91, 95). She was awakened the next morning and arrested. (R. 143:88). Police transported her to the police department and put each person in a room for interrogation. (R. 143:89-90). Britnee told police that Zaelit was in the stolen car, but that was not true. (R. 143:90 (stating she told police he was in the car, but "I don't remember him being in the car")). The only person she saw in the Toyota was Justin. (R. 143:90, 101). She saw him "taking stuff out of the car. That's all I remember. I didn't know whose car it was or anything like that." (R. 143:90-91). He was in the car when she pulled up to the trailer home. (R. 143:91, 92-93).

Britnee did not recall telling police that she drove Zaelit and Justin to the apartment complex and they went to the stolen car and drove away in it. (R. 143:92). Nevertheless, she testified that if she made that statement to police, "I said it to get Zach [Zaelit] in trouble because we were fighting that night." (R. 143:92, 94, 100, 102).

Justin testified that on July 20, he was with Zaelit at a barbecue until around 7:00 that evening when they separated. (R. 143:106-07). Justin "went to talk to [his] wife for a little bit and then [he] wandered around and stole a car" (R. 143:106) from an apartment complex at 3300 South and 800 East (R. 143:109-10) because "the key was in it." (R. 143:109). He took the car to his wife's aunt's trailer home, and Britnee and Copper

followed him in Britnee's car. (R. 143:107-08, 110). Zaelit arrived half an hour later. (R. 143:107). They went to the back room to watch TV (R. 143:108-09), then Justin went to the front room and fell asleep on the couch, while Zaelit slept in the back room. (R. 143:108-09). At around 3:00 a.m., Justin took the license plate off the Toyota to conceal its identity. (R. 143:111-12). He went back into the living room until it was time to go to work. He did not go into the bedroom. (R. 143:113). When he went outside in the morning, "the police were already there." (R. 143:112). Justin denied speaking to the police or to Agent Olive about the matter. (R. 143:114). Also he admitted to stealing the car, taking it to the trailer home, and taking the license plate off. (R. 143:116).

According to Justin, if agents maintained that he made an earlier statement implicating Zaelit in the theft, "[t]hat wouldn't be true." (R. 143:117). He refused to talk to agents. (R. 143:117, 118). Also, Justin entered a guilty plea for stealing the Toyota (R. 143:118, 119, 120-21), and "[i]n this particular case [he] acted alone, [he] did it by [him]self." (R. 143:119). The jury returned a verdict against Zaelit for theft by receiving stolen property. (R. 143:200).

SUMMARY OF THE ARGUMENT

The State charged Zaelit with theft by receiving stolen property. Zaelit maintains the evidence was insufficient to support the charge. Specifically, the only witnesses to Zaelit's actions testified that he did not steal the vehicle, he did not possess it, he did not get into the vehicle for any reason, he did not remove the license plates, and he did not aid or abet Justin in his theft or possession of the car. In addition, the car was not found on Zaelit's property. Indeed, according to the witnesses, Justin stole the car and drove it

to his wife's aunt's trailer home. Notwithstanding the testimony from witnesses, the State introduced evidence from law enforcement agents that the witnesses made unsworn, inconsistent, out-of-court statements implicating Zaelit in the theft. Yet the out-of-court statements are not sufficient to support that Zaelit committed the crime. Zaelit respectfully requests that this Court reverse the conviction.

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THAT ZAELIT COMMITTED THEFT BY RECEIVING STOLEN PROPERTY.

A. THE SUFFICIENCY STANDARD.

Zaelit has raised a sufficiency issue. For sufficiency claims, this Court has stated,

> "We reverse the jury's verdict in a criminal case when we conclude as a matter of law that the evidence was insufficient to warrant conviction." The defendant must overcome a heavy burden in challenging the sufficiency of evidence for a jury verdict. "We view the evidence in a light most favorable to the jury verdict," and "will reverse only if the evidence is so 'inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" However, though the burden is high, it is not impossible. "We will not make speculative leaps across gaps in the evidence." "Every element of the crime charged must be proven beyond a reasonable doubt." "To affirm the jury's verdict, we must be sure the State has introduced evidence sufficient to support all elements of the charged crime."

State v. Gonzales, 2000 UT App 136, ¶ 10, 2 P.3d 954 (internal citations omitted); *see also State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288 (stating evidence and inferences will be considered in the light most favorable to the jury verdict) (citation omitted); *Holgate*, 2000 UT 74, ¶ 18; *State v. Nelson*, 2007 UT App 34, ¶ 8, 157 P.3d 329 (stating if jurors could reasonably believe that the elements of the crime "were met, 'the verdict must stand'") (citation omitted).

Utah courts require a defendant raising a sufficiency claim to marshal the evidence and to "'demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" *State v. Boyd*, 2001 UT 30, ¶ 13, 25 P.3d 985 (citations omitted); *see also Harding v. Bell*, 2002 UT 108, ¶ 19, 57 P.3d 1093 (stating the party contesting the verdict must assume the role of "devil's advocate"); *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (stating proper marshaling requires appellant to present "in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence").

According to the Utah Supreme Court, when conducting a sufficiency review, "it is the duty of the reviewing appellate court to perform its 'review in the context of the whole record, or at least that portion of the record to which its attention [is] drawn by the appellant's marshaling obligation or the appellee's response to the appellant's marshaled evidence.'" *State v. Gardner*, 2007 UT 70, ¶ 24, 167 P.3d 1074 (citing *S.B.D. v. State (State ex rel. Z.D.)*, 2006 UT 54, ¶ 39, 147 P.3d 401). A sufficiency "inquiry ends," *id.* at ¶ 26, if there is evidence for all elements, whether it is brought to the court's attention by way of marshaling or by way of appellee's brief. *See id.* at ¶ 24.

(1) ***Circumstantial Evidence or Conflicting Evidence May Support a Verdict If It Is Credible and Meets the Reasonable-Doubt Standard.***

Under Utah law, "'a conviction can be based on sufficient circumstantial evidence.'" *State v. Lyman*, 966 P.2d 278, 281 (Utah Ct. App. 1998) (quoting *State v.*

Brown, 948 P.2d 337, 344 (Utah 1997)). "'Circumstantial evidence need not be regarded as inferior evidence if it is of such *quality and quantity* as to justify a jury in determining guilt beyond a reasonable doubt, and is sufficient to sustain a conviction.'" *Lyman*, 966 P.2d at 281 (emphasis added) (quoting *State v. Nickles*, 728 P.2d 123, 127 (Utah 1986)); *see also* *State v. Hales*, 2007 UT 14, ¶¶ 62-64, 152 P.3d 321 (considering circumstantial evidence for conviction); *State v. Span*, 819 P.2d 329, 332 (Utah 1991). If circumstantial evidence is presented, this Court must determine whether "the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove" each element beyond a reasonable doubt. *Brown*, 948 P.2d at 344 (quoting *State v. Workman*, 852 P.2d 981, 985 (Utah 1993)); *State v. James*, 819 P.2d 781, 789 (Utah 1991) (stating "intent can be proven by circumstantial evidence").

In addition, Utah courts have ruled that evidence may be sufficient even if it is contradictory or conflicting. That is, the mere existence of conflicting evidence does not warrant reversal. *See James*, 819 P.2d at 784; *Workman*, 852 P.2d at 984 (stating "the jury serves as the exclusive judge" when evidence is in conflict/dispute) (cite omitted); *State v. Dunn*, 850 P.2d 1201, 1213 (Utah 1993) (stating credibility is an issue for the jury); *State v. Cravens*, 2000 UT App 344, ¶ 18, 15 P.3d 635 (stating "it is the province of the trier of fact" to determine what testimony to believe and what inferences to draw).

So long as credible evidence exists to support the elements of the crime, a reviewing court will not disturb the jury's decision. *See Boyd*, 2001 UT 30, ¶ 16. The court will assume that the jury sifted through the conflicts and contradictions and "'believed the evidence supporting the verdict.'" *Id.* at ¶ 14 (quoting *Dunn*, 850 P.2d at

1213); *see also id.* at ¶ 16 (stating it is typically the function of the jury to weigh and assess conflicting evidence and "'*to determine the credibility of the witnesses*'") (emphasis in original; citations omitted); *State v. Colwell*, 2000 UT 8, ¶ 42, 994 P.2d 177; *State v. Chaney*, 1999 UT App 309, ¶ 30, 989 P.2d 1091 ("We may not weigh evidence or assess witness credibility, but instead 'assume that the jury believed the evidence and inferences that support the verdict'" (cite omitted)). However, if a witness's testimony is apparently false, the court may disregard it. *Robbins*, 2009 UT 23, ¶ 16. In fact, a court may reevaluate a jury's verdict "where (1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt." *Id.* at ¶ 19; *see also id.* at ¶ 21 (recognizing that a judge may "'disregard or discount'" evidence that is incredible) (citation omitted).

(2) ***Evidence that Gives Rise to Speculative Possibilities or Inference upon Inference Is Insufficient. In Addition, a Verdict Supported Only by Out-of-Court Inconsistent Statements Will Not Be Upheld.***

If a verdict is based on inferences that give rise to "speculative possibilities of guilt," it is not legally valid. *Brown*, 948 P.2d at 344 (quoting *Workman*, 852 P.2d at 985). A reviewing court will not indulge in "inference upon inference" or worse, "inference upon assumption." *State v. Layman*, 953 P.2d 782, 791 (Utah Ct. App. 1998) (internal quotes and cites omitted), *aff'd*, *State v. Layman*, 1999 UT 79, 985 P.2d 911. It will not take "speculative leaps across gaps in the evidence." *Gonzales*, 2000 UT App 136, ¶ 10 (cite omitted). Rather, it is the function of a reviewing court to ensure there is "sufficient competent evidence as to each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." *State v. Merila*, 966

P.2d 270, 272 (Utah Ct. App. 1998) (internal emphasis omitted) (quoting *James*, 819 P.2d at 784; *State v. Warden*, 813 P.2d 1146, 1150 (Utah 1991)).

Likewise, uncorroborated "'out-of-court statement[s] which [are] denied at trial by the declarant [are] insufficient by [themselves] to sustain a conviction.'" *State ex rel. C.L.*, No. 20040037, 2005 UT App 221, *1-2 (unpublished) (alternations in original) (citing *State v. Ramsey*, 782 P.2d 480, 484 (Utah 1989)); *see also State v. Hamilton*, No. 20060131-CA, 2007 UT App 130, *1 (unpublished) (recognizing same). To be clear, an inconsistent out-of-court statement may be *admissible* in evidence at trial. However, it may be insufficient to support the verdict. "The distinction lies in the difference between *admissibility* of the prior statement, and the *sufficiency* of the evidence derived" from the statement. *State v. Pierce*, 906 S.W.2d 729, 735 (Mo. Ct. App. 1995) (emphasis added).

Specifically, Rule 801 states that an inconsistent statement is admissible if the declarant is available to testify and subject to cross-examination. Utah R. Evid. 801(d)(1). According to the rule, the prior inconsistent statement "is not hearsay." *Id.* at 801(d)(1)(A). That is, it is *not* "offered in evidence to prove the truth of the matter asserted." Utah R. Evid. 801(c) (defining "[h]earsay"). Rather, it may be offered to show that on a prior occasion, the witness made an inconsistent statement. *See id.* at 801(d)(1)(A); *see also* Utah Const. art. VIII, § 4 (stating the supreme court shall adopt rules). In addition, evidence of a prior inconsistent statement may be used to impeach a witness. *See Miller v. Archer*, 749 P.2d 1274, 1278 (Utah Ct. App. 1988) (admitting statements for impeachment), *cert. denied*, 765 P.2d 1278 (Utah 1988).

However, before evidence of an out-of-court inconsistent statement may be

deemed sufficient to support a verdict, it must be corroborated by other facts and circumstances. *See Ramsey*, 782 P.2d at 483-84 (citing cases where the Utah Supreme Court has held that uncorroborated inconsistent statements are insufficient by themselves to support a civil verdict); *Robbins*, 2009 UT 23, ¶ 14 (relying on *Ramsey*, 782 P.2d at 483); *Hamilton*, No. 20060131-CA, 2007 UT App 130, *1 (unpublished) (stating out-of-court inconsistent statements require corroboration to uphold a conviction); *see also State v. Gray*, 717 P.2d 1313, 1318 (Utah 1986) (requiring out-of-court statements of a co-conspirator to be verified by independent evidence of defendant's participation). The Utah Supreme Court has long recognized that a verdict cannot be based solely on out-of-court statements unless the statements are "supported by a residuum of legal evidence competent in a court of law." *Sandy State Bank v. Brimhall*, 636 P.2d 481, 486 (Utah 1981) (footnote omitted); *Hackford v. Industrial Comm'n*, 358 P.2d 899, 901 (Utah 1961) (stating same); *Ogden Iron Works v. Industrial Comm'n*, 132 P.2d 376, 380 (Utah 1942) (stating same); *see also Robbins*, 2009 UT 23, ¶ 16 (recognizing that the civil standard– the preponderance of the evidence – is less exacting than the criminal standard; and stating a trial court may "afford less deference" to inconsistent testimony in a criminal case than that afforded in a civil case).

Other courts are in accord. *See, e.g., Brower v. State*, 728 P.2d 645, 648 (Alaska Ct. App. 1986) (recognizing that "evidence of an uncorroborated prior inconsistent statement is not sufficient to establish evidence of a central element of the crime charged") (footnote and citation omitted); *State v. Allred*, 655 P.2d 1326, 1330 (Ariz. 1982) (disavowing reliance on prior inconsistent statement where it was the only

evidence to support defendant's commission of the crime); *Acosta v. State*, 417 A.2d 373, 375-77 (Del. 1980) (affirming convictions for acts testified to in court, and reversing for acts supported only by officer's testimony of out-of-court statements from two witnesses); *State v. Green*, 667 So.2d 756, 760-61 (Fla. 1995) (stating prior inconsistent statements are not sufficient to support a criminal verdict without proper corroborating evidence); *Moore v. State*, 473 So.2d 686 (Fla. Ct. App. 1984), *aff'd*, 485 So.2d 1279, 1280-82 (Fla. 1986) (recognizing that two witnesses, who provided similar grand jury testimony against defendant, recanted those statements in sworn depositions and were prosecuted for perjury without specifying which statements were untrue; notwithstanding those circumstances, the prior statements made in grand jury proceedings would not support the murder conviction); *People v. Collins*, 274 N.E.2d 77, 85 (Ill. 1971) (stating "this court has refused to allow a conviction to be based solely on unsworn statements by witnesses"); *Roby v. State*, 495 N.E.2d 721 (Ind. 1986) (stating a conviction cannot be based solely upon a repudiated out-of-court statement unless there was substantial evidence of probative value to support the credibility of the statement); *State v. Allien*, 366 So.2d 1308, 1311-12 (La. 1978) (stating a conviction cannot be based on prior inconsistent statements from two witnesses, who recanted the statements at trial); *Pierce*, 906 S.W.2d at 733-35 (stating although Missouri law allows a prior statement to be used in evidence, inconsistent statements may not be the sole basis for the prosecution since such statements lack adequate safeguards to assure reliability; also, where the "prosecutrix, the hotline caller, and all witnesses (other than the authorities) totally recanted at trial," the conviction required reversal); *State v. Gommenginger*, 790 P.2d

455, 463 (Mont. 1990) (stating an unreliable prior inconsistent statement is insufficient to support the conviction); *State v. White Water*, 634 P.2d 636, 638-39 (Mont. 1981) (stating a conviction cannot be based solely on prior inconsistent statements where the accuracy of the prior statement is repudiated at trial); *United States v. Orrico*, 599 F.2d 113, 118-19 (6th Cir. 1979) (ruling that even where prior inconsistent statements may be admissible as substantive evidence, they are insufficient as the sole evidence for a verdict).

Still other courts have ruled that a prior inconsistent statement may be sufficient to support a conviction only if it possesses certain indicia of reliability, including having been made under oath or reduced to a signed statement. *See, e.g.*, *People v. Lucky*, 753 P.2d 1052, 1070 (Calif. 1988) (stating inconsistent out-of-court statement may support conviction where it was made under oath or in a judicial proceeding), *cert. denied*, 488 U.S. 1034 (1989); *State v. Tomas*, 933 P.2d 90, 98-100 (Hawaii Ct. App 1997) (allowing a prior inconsistent statement to be sufficient for conviction where it was in writing and signed), *overruled on other grounds*, *State v. Gonsales*, 984 P.2d 1272, 1275 n.1 (Hawaii Ct. App. 1999); *State v. Mancine*, 590 A.2d 1107, 1115-17 (N.J. 1991) (identifying a fifteen-factor test for reliability; and stating sufficiency depends on the extent to which other independent evidence corroborates the inconsistent statement); *Commonwealth v. Lively*, 610 A.2d 7, 10 (Pa. 1992) (allowing use of prior inconsistent statements to support the verdict if they are given under oath or at formal proceedings, are reduced to writing, or are recorded verbatim and contemporaneous with the making of the statements); *State v. Marcy*, 680 A.2d 76 (Vt. 1996) (stating prior inconsistent statement did not raise reliability concerns and was bolstered by some corroborating evidence

sufficient to support the conviction); *see also* Utah R. Evid. 102 (2009) (stating the rules shall be construed to promote the development of the law to the end that "the truth may be ascertained and proceedings justly determined").

In this case, the State relied on unsworn, uncorroborated, inconsistent, out-of-court statements to support the verdict. That was insufficient.

B. THE STATE WAS REQUIRED TO ESTABLISH ZAELIT'S PARTICIPATION IN THE CHARGED OFFENSE.

The State charged Zaelit with theft by receiving stolen property. Section 76-6-408(1) defines that offense as follows: "A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it." Utah Code Ann. § 76-6-408(1) (2008).

Utah courts have identified four elements for the offense where (1) property belonging to another has been stolen, (2) defendant received it, retained it, disposed of it, concealed it, sold it, withheld it, or aided in such, (3) defendant knew or believed the property was stolen, and (4) he acted purposely to deprive the owner of the property. *See State v. Hill*, 727 P.2d 221, 223 (Utah 1986); *see also State v. Murphy*, 617 P.2d 399, 401-02 (Utah 1980) (stating the last element concerns the defendant's intent at the time of possession); *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980) (identifying elements); *State v. Hughes*, No. 20010617, 2003 UT App 71, *1 (unpublished) (using "retained or withheld" as interchangeable); *State v. Davis*, 965 P.2d 525, 536 (Utah Ct. App. 1998)

(stating that knowledge or belief "'is seldom directly proved and is usually inferred from the facts and circumstances in evidence'") (citations omitted), *cert. denied*, 982 P.2d 88 (Utah 1999); *State v. Ramon*, 736 P.2d 1059, 1062-63 (Utah Ct. App. 1987) (stating the statute for receiving stolen property is divided into two separate parts, where the defendant may be culpable for receiving/retaining/disposing, or concealing/selling/withholding), *cert. denied*, 765 P.2d 1277 (Utah 1987).

The State's theory in this case hinged on direct liability or accomplice liability where Zaelit *either* stole, received, retained, withheld, or concealed the Toyota Camry himself, *or* he was a party to such offense. (*See* R. 143).

For direct liability, the State was required to show that Zaelit had personal, conscious, and exclusive possession of the property. *See State v. Dyett*, 199 P.2d 155, 157 (Utah 1948) (stating if the prosecution has not presented evidence directly connecting the defendant to the theft, possession must be personal, conscious and exclusive; "the mere association of a defendant with property recently stolen is insufficient"); *State v. Brooks*, 126 P.2d 1044, 1046 (Utah 1942) (stating receipt of recently stolen property requires proof of conscious possession); *State v. Kinsey*, 295 P. 247, 249 (Utah 1931) (stating "possession must not only be personal, exclusive, and unexplained, but must also be conscious, or a conscious assertion of possession by the accused"); *State v. Morris*, 262 P. 107, 110-11 (Utah 1927) (stating defendant must have personal, exclusive possession).

For accomplice liability, the State was required to show that Zaelit had the mental state for the offense and he directly committed it, or he solicited, requested, commanded, encouraged or aided another in committing the offense. *See* Utah Code Ann. § 76-2-202

(2008) (defining accomplice liability); *In re M.B.*, 2008 UT App 433, ¶ 7, 198 P.3d 1007. This Court has ruled that "'[m]ere presence, or even prior knowledge, does not make one an accomplice to a crime absent evidence showing – beyond a reasonable doubt – that [a] defendant advised, instigated, encouraged, or assisted in perpet[r]ation of the crime.'" *M.B.*, 2008 UT App 433, ¶ 8 (alteration in original; citing *In re V.T.*, 2000 UT App 189, ¶ 11, 5 P.3d 1234); *see also Dyett*, 199 P.2d 157-58 (recognizing if the evidence supports that the defendant had a mere association with the property or was merely present at the place where the property was found, those facts are insufficient).

"However, '[w]hile mere presence at the scene of a crime affords no basis for a conviction, presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred.'" *M.B.*, 2008 UT App 433, ¶ 8 (citing *American Fork City v. Rothe*, 2000 UT App 277, ¶ 7, 12 P.3d 108). This Court further explained accomplice liability as follows:

> [In *In re V.T.*, 2000 UT App 189, 5 P.3d 1234], this court concluded that a juvenile defendant's presence during and after a theft did not support a conclusion that he was an accomplice because no evidence suggested his active involvement. *See id.* ¶ 20. The evidence showed that the defendant had been with friends when they stole a camcorder and that he remained in their presence following the theft while his friends discussed the crime. *See id.* ¶¶ 2-5. The State argued that this evidence, coupled with the defendant's friendship with the thieves, supported an inference that the defendant encouraged the theft and was, therefore, guilty of the crime as an accomplice. *See id.* ¶ 10. The juvenile court agreed. *See id.* ¶ 7. We overturned the juvenile court's ruling, concluding that "[t]he facts . . . prove[d] only that [the defendant] was present before, during, and after the theft of the camcorder" and that "[t]he lack of any evidence showing that he at least encouraged the other defendants in stealing the camcorder preclude[d]" a determination that he was culpable as an accomplice. *Id.* ¶ 20.

2008 UT App 433, ¶ 9.

In short, the evidence must show that the defendant personally possessed or handled stolen property with knowledge or a belief of its circumstances, or he was involved in the criminal enterprise. *See Davis*, 965 P.2d at 535 (recognizing the statute requires proof of possession and intent; and a "necessary element" is that "defendant knew the property was stolen or believed the property was probably stolen"); *State v. Pierce*, 722 P.2d 780, 781-82 (Utah 1986) (stating defendant was told the air compressor was stolen); *State v. Clayton*, 658 P.2d 621, 623 (Utah 1983) (stating evidence supported defendant's efforts in altering the appearance of the vehicle for the charge of receiving stolen property); *Lamm*, 606 P.2d at 231-32 (ruling the evidence supported the conviction); *M.B.*, 2008 UT App 433, ¶ 11 (stating the evidence was insufficient where it failed to support defendant's active involvement); *State v. Gabaldon*, 735 P.2d 410, 412 (Utah Ct. App. 1987) (stating defendant personally handled the stolen goods and a witness saw defendant and a second person with the goods, among other things).

C. THE MARSHALED EVIDENCE FAILS TO SUPPORT THE CONVICTION.

(1) ***The Marshaled Evidence.***

Zaelit does not dispute that on July 20 or July 21, 2008, Christine Armstrong's Toyota Camry was stolen from her apartment complex. (*See* R. 143:51-55 (Armstrong's testimony)). However, the evidence fails to support that Zaelit had any involvement in the crime, either directly or as an accomplice. *See Kinsey*, 295 P. at 249 (stating possession must be personal, exclusive, unexplained, conscious); *see also In re M.B.*, 2008 UT App 433, ¶ 9 (recognizing that mere presence is insufficient for a conviction). The marshaled evidence supports the following:

- On July 21, Armstrong reported that her car was stolen from 3334 South 825 East. (R. 143:51-52). She had last seen it on July 20 at about 9:45 p.m. (R. 143:52). Officers used information from a GPS tracking device to locate the vehicle in a driveway for a trailer home at 1268 West 7055 South. (*See* R. 143:53-55). Armstrong went to the trailer home, identified the car, and found clothes and items that did not belong to her. (*See* R. 143:54-55). Also, she testified the license plate(s) were gone. (R. 143:56). Armstrong did not give anyone permission to take her car. (*See* R. 143:52, 57).

- On July 21, technician Bardole arrived at the trailer home and took inventory of a license plate in a back southwest bedroom of the trailer home. (R. 143:60). She was not the person who originally found the license plate. She believed Detective Kaer found it. (R. 143:60, 61-62, 63; *but see* R. 143:152-53, 157 (Kaer stating he did not go into the trailer or find the license plate(s))).

- On July 21, Detective Kaer arrived at the trailer home and met Justin Llewelyn outside. (*See* R. 143:141). Also, Kaer knocked on the back door until Zaelit emerged from where the back bedroom would be. (R. 143:142; *but see* R. 143:157 (Kaer stating he did not go into the trailer)).

- Zaelit and Britnee slept in a back room. (*See* R. 143:108-09).

- Copper testified that on July 20, she and Britnee picked up Justin and Zaelit at approximately 11:00 p.m. in the area of 3900 South and 700 East (R. 143:66), approximately seven blocks from Armstrong's apartment. (*See* R. 143:51-52). The four drove to a trailer home at 1268 West 7055 South. (*See, e.g.*, R. 143:66). During the drive, they stopped at an apartment complex, Justin and Zaelit got out of the car "for a brief moment," they "got back in [the car]" with Britnee and Copper, and they continued to the trailer home in Britnee's car. (R. 143:69, 70, 71, 76). The four were in a bedroom that night until Justin and Copper went into the living room. (*See* R. 143:79).

- Britnee testified that on July 20, she and Copper picked up Justin and Zaelit in her car. (R. 143:87-88 (stating Britnee borrowed her car); 143:95-96). At some point, Justin left and they all ended up at the trailer home. (R. 143:91). Britnee saw Justin in the stolen car. (R. 143:90, 101). She saw him take "stuff out of the car." (R. 143:90-91).

- Detective Kaer interviewed Copper. He stated she was lucid and he had no problems with the interview. (R. 143:143, 145). He testified that on July 21, she made statements implicating Zaelit in the car theft. According to Kaer, Copper and Britnee drove Zaelit and Justin around for a while, "then they went over to an apartment complex." (R. 143:144). Justin and Zaelit got out of

Britnee's car and drove the stolen vehicle. (R. 143:144). Justin and Zaelit followed Copper and Britnee to the trailer in West Jordan, and Copper "saw them take some stuff out of the [stolen car] and go inside" the trailer. (R. 143:145).

- Copper did not remember talking to officers or telling them that Justin and Zaelit got into the stolen car and drove away. (R. 143:68, 71-72).

- Detective Kaer also interviewed Britnee. He testified that Britnee's statements and Copper's statements were "slightly different," but "the story was the same," and "almost identical." (R. 143:148). According to Kaer, Britnee and Copper drove Zaelit and Justin in Britnee's car to the area of 3900 South and 900 East, and Zaelit and Justin got into the stolen car and drove it to the trailer home. (R. 143:148, 149). Britnee and Copper followed the men to the trailer home. (R. 143:149). Britnee told Kaer they made a stop at another complex at some point. (R. 143:149 (stating Britnee's statement was "kind of confusing")).

- Britnee vaguely remembered talking to officers and she maintained at trial that her prior statements to officers were not true. (R. 143:90, 92, 100-01).

- Britnee did not put the license plate in the bedroom. (R. 143:94).

- Justin testified that on July 20, he was with Zaelit early in the evening, until approximately 7:00 p.m., then he left to steal a car from an apartment complex at 3300 South and 800 East because the key was in it. (*See* R. 143:106-07, 109-10, 116). At some point he had Britnee and Copper follow him in their car to the trailer in West Jordan (R. 143:108, 110; *see also* R. 143:107), and Zaelit showed up at around 1:30 or 2:00 a.m. (R. 143:106-07; *see also supra*, page 20 (Copper and Britnee testified that Zaelit was in their car)).

- After 3:00 that morning, Justin took the license plate off the stolen car to conceal its identity. (R. 143:111-12). However, he did not go into the back room again that morning. (R. 143:113).

- Justin threw the license plate on or in a 1967 Chrysler parked in the carport for the trailer home. (R. 143:124). The trailer home belonged to Justin's wife's aunt, Shauna Green. (*See* R. 143:157-58). Green was at the trailer that morning when officers arrived. (R. 143:157). She would not consent to a search. (R. 143:158).

- Agent Olive interviewed Justin. (R. 143:126). According to Olive, Justin saw the Toyota Camry for the first time when it was parked at the trailer home. (R. 143:127). The license plate was missing and his friends were inside the trailer. (*Id.*) Justin came to the conclusion that the vehicle was stolen. (*Id.*)

Later Justin changed his story. He "admitted that he was in the vehicle and that he had driven the vehicle." (R. 143:128). Justin "refused" to make a written statement because "he was afraid Zachary [Zaelit] would see and read his statement." (R. 143:128, 131). Justin later changed his story again and claimed Zaelit was driving the stolen car, and Justin, Copper, and Britnee were passengers. (R. 143: 129). At some point Zaelit pulled the car off the road and Justin drove. (*Id.*) Also, Zaelit took them to the apartment complex for the car. (R. 143:130, 136, 138).

- Justin denied talking to Olive. (R. 143:114; *see also* R. 143:117, 118).

- Detective Madsen testified that after Zaelit was transported to the police station, he conducted an interview. Zaelit waived his rights per *Miranda*, and agreed to talk. (R. 143:162). Zaelit told Madsen that he had been with Justin the day before, but he would not elaborate, and he was not "real compliant" during the interview. (R. 143:162). According to Madsen, Zaelit wanted to go straight to jail: he was cold and hungry, and being on the street was hard on him because he used drugs. (R. 143:162, 167, 170). Also, Zaelit told Madsen, "I haven't done nothing, I haven't done nothing." (R. 143:162, 163). Zaelit avoided Madsen's questions, so Madsen left the room to let Zaelit "gain his composure." (R. 143:163).

- Madsen returned with Kaer a short time later to continue the interview with Zaelit, but it was "more of the same." (R. 143:163). As the officers left the room a second time, Zaelit was "somewhat belligerent and raising his voice and whatnot throughout the interview and it was at this point he got extremely belligerent and he began to scream . . . where you could probably hear it all the way downstairs . . . 'I need to talk to my lawyer.'" (R. 143:163-64). He yelled, "I'll talk to you when I get a lawyer and then you can watch how irritated I'll be." (R. 143:164). Also, he used profanity. (R. 143:164); *but see* *State v. Wagner*, 2009 MT 256, ¶¶ 15-20, -- P.3d – (Mont. August 2009) (stating a prosecutor may not elicit testimony concerning defendant's request to speak to a lawyer in order to suggest guilt, and citing *Doyle v. Ohio*, 426 U.S. 610, 614 n.5 (1976)) (attached as Addendum C); *Doyle*, 426 U.S. at 618-19 (ruling a prosecutor may not use a defendant's silence after receiving *Miranda* warnings to suggest guilt).

- Zaelit told Madsen that officers would not find his fingerprints on the stolen car. (R. 143:168).

While the marshaled evidence supports that Justin stole the car, the only evidence implicating Zaelit consisted of unsworn, out-of-court statements. (*Supra*, pages 20-22, herein). Yet the State failed to present credible, independent, corroborating evidence for

the out-of-court statements. *See* *Ramsey*, 782 P.2d at 484; *C.L.*, No. 20040037, 2005 UT App 221 (unpublished); (*see also* *supra*, Arg. A.(2), herein).

(2) ***The State's Evidence of Out-of-Court Statements Was Insufficient.***

(a) *The Out-of-Court Statements Lacked Corroboration.*

Under Utah law, a verdict based on an out-of-court statement that a declarant recants is insufficient, unless the statement is corroborated. *See* *Ramsey*, 782 P.2d at 483-84; *Hamilton*, No. 20060131-CA, 2007 UT App 130, *1 (unpublished); *C.L.*, No. 20040037, 2005 UT App 221, *1-2 (unpublished); (*see also* *supra*, Arg. A.(2)). In this case, Detective Kaer and Agent Olive claimed that Justin, Copper, and Britnee made statements to police implicating Zaelit in the theft. (R. 143:127-30 (stating Justin changed his story to implicate Zaelit); 143:144-45 (stating Copper claimed Justin and Zaelit went to the apartment complex and drove the stolen vehicle to the trailer); 143:148 (stating Britnee claimed Zaelit and Justin got into the stolen car at 3900 South and 900 East and drove to the trailer in West Jordan)). Yet Justin, Copper, and Britnee denied those statements. (*See, e.g.*, R. 143:72-73 (Copper did not recall making such statements to police); 143:90, 92 (Britnee did not recall making the statements to police, and she denied seeing Zaelit in the car); 143:114 (Justin denied speaking to the police or to his parole officer about the matter)); (*see also* *supra*, Arg. C.(1), herein).

And in this case, the State failed to present evidence of corroborating facts or circumstances to support the out-of-court statements. It failed to present evidence that Zaelit was in personal, conscious, and exclusive possession of the car at any time. (R. 143); *see* *Hill*, 727 P.2d 221, 223 (describing elements for the offense); *Dyett*, 199 P.2d at

157 (requiring evidence of personal, conscious, exclusive possession for a conviction); Utah Code Ann. § 76-6-408(1). In addition, it failed to present evidence that Zaelit made any solicitation, request, command, or encouragement of Justin or that he aided Justin in receiving, retaining, disposing of, concealing, selling, or withhold the property. *See* Utah Code Ann. § 76-2-202 (2008) (defining accomplice liability); *M.B.*, 2008 UT App 433, ¶ 8 (recognizing evidence must support defendant's participation; also, mere presence will not support a conviction).

For example, Armstrong did not describe finding items in her car belonging to Zaelit. (R. 143:54-55). No reliable witness identified Zaelit as involved in the matter. (*See* R. 143; *infra*, Arg. C.(2)(b), herein). Officers did not find Zaelit's fingerprints in the car or on the license plate(s). (*See* R. 143). Shauna Green, the owner of the trailer home, had access to areas where Justin placed the license plate(s) and she had the opportunity to bring the license plate(s) into the trailer home. (*See* R. 143:124 (stating Justin removed the license plate and placed it on or in a car in the carport); *see also* R. 143:58-60, 157-58 (stating an officer found the license plate in a bedroom while executing a search warrant; also, Green was at the trailer home on July 21 and did not consent to a search of the trailer requiring officers to return later with the warrant)).

Moreover, the offense at issue here could be committed easily by a single person: it did not require the aid, encouragement, or support of a second party to serve as lookout or to drive a getaway vehicle. *See* Utah Code Ann. § 76-6-408(1) (defining theft by receiving stolen property). And the officers did not find the car at an address relevant to Zaelit except that he was staying at the trailer home with four other people (*see, e.g.*, R.

143:157-58), one of whom had admitted to the offense and was related to the owner of the trailer home (Justin). (*See, e.g.*, *id.*; *see also* R. 143:106, 109-10, 116, 118, 119). Without credible independent evidence to corroborate the out-of-court statements, the verdict cannot stand. (*See, e.g.*, *supra*, Arg. A.(2)).

(b) *The Out-of-Court Statements Lacked Trustworthiness and Reliability.*

The prior inconsistent statements themselves were not sufficient to constitute corroboration because they lacked trustworthiness. *See State v. Mauchley*, 2003 UT 10, ¶ 52, 67 P.3d 477 (stating factors to consider in assessing the credibility of an out-of-court statement include, "evidence as to the spontaneity of the statement; the absence of deception, trick, threats, or promises to obtain the statement; the defendant's positive physical and mental condition, including age, education, and experience; and the presence of an attorney when the statement is given"); *Scott v. HK Contractors*, 2008 UT App 370, ¶ 10, 196 P.3d 635 (identifying factors for reliability), *cert. denied*, 205 P.3d 103 (Utah 2009); *State v. Webster*, 2001 UT App 238, ¶ 27, 32 P.3d 976 (identifying several factors to shed light on the trustworthiness of an out-of-court statement, including, the declarant's motive for making the statement; "'the character of the declarant for truthfulness and honesty and the availability of evidence on the issue;'" "'whether the [statement] was given voluntarily, under oath, subject to cross examination and a penalty for perjury;'" "'the extent to which the [declarant's statement] reflects his personal knowledge;'" "'whether the [declarant] ever recanted his [statement];'" and "'whether the declarant's statement was insufficiently corroborated'") (alterations in original; citations omitted).

Justin's Out-of-Court Statements Were Not Reliable. Beginning with Justin, Agent Olive testified he interrogated Justin after Justin was arrested and in police custody at the police department. (R. 143:126). Olive claimed Justin appeared to understand questions during the interrogation, and he gave appropriate responses, although some responses were "a little vague here and there." (R. 143:126-27; *but see* R. 143:112 (stating Justin was "high" on meth)); *Mauchley*, 2003 UT 10, ¶ 52 (considering the declarant's physical and mental condition as part of the credibility assessment). Olive did not specify which responses were vague, leaving the jury to guess. (R. 143:126-27). In addition, during the interrogation, Justin changed his story in response to Olive's interrogation techniques and trickery. (*See* R. 143:127 (stating Justin claimed first that he saw the stolen car parked at the West Jordan trailer home and concluded it was stolen); 143:128 (stating Justin then admitted he was in the vehicle after Olive told him that a unit was processing the vehicle for fingerprints); 143:129-30 (stating Justin again changed his story to claim Zaelit drove the stolen car and the others were passengers)).

Moreover, Justin's out-of-court statements were not spontaneous, he was not under oath or subject to cross examination when he made the statements to the agent, he was in custody and en route to prison, he did not have access to counsel, and officers did not record his statements. (*See, e.g.*, R. 143:125-39 (Olive's testimony)). The available information fails to support Justin's character for honesty, and it fails to support that the unsworn, unrecorded statements were reliable or trustworthy to support a conviction. *See, e.g.*, *Mauchley*, 2003 UT 10, ¶ 52 (identifying factors for credibility); *Webster*, 2001 UT App 238, ¶ 27 (identifying factors that shed light on trustworthiness); *see also Gray*,

717 P.2d at 1318 (requiring the State to support a co-conspirator's out-of-court statements with independent and exclusive evidence of the defendant's participation).

Indeed, since Justin was directly involved in the theft, the evidence supports that he was motivated to make statements implicating Zaelit in an effort to curry favor with authorities, likely in the hopes that they would be lenient with him. *See Webster*, 2001 UT App 238, ¶ 27 (identifying factors that shed light on trustworthiness, including motive). Where Justin's prior out-of-court statements themselves were internally *inconsistent* (*see Robbins*, 2009 UT 23, ¶¶ 18-19 (stating trial court should reevaluate verdict when testimony is contradictory or inconsistent)), obtained through police trickery, and likely motivated out of a desperate attempt to gain favor with authorities, the out-of-court statements lack trustworthiness. *See, e.g.*, *Mauchley*, 2003 UT 10, ¶ 52; *Webster*, 2001 UT App 238, ¶ 27.

The Out-of-Court Statements Made by Copper and Britnee Were Not Reliable. As for Copper and Britnee, their earlier statements were not reliable. Indeed, both testified that they did not recall making specific statements to officers. (*See* R. 143:68, 71-72 (Copper did not remember making statements); 143:90, 92, 100-01 (Britnee vaguely remembered talking to officers)). And each acknowledged that her prior out-of-court statements were unreliable. (R. 143:68, 74 (Copper stated she was high when she made out-of-court statements); 143:93-94 (Britnee stated she wanted to get Zaelit in trouble when she made the statements because they were fighting)).

Kaer did not record the out-of-court statements. (*See* R. 143:145-46 (stating Copper agreed to make a written statement, but giving no indication that she did or that

the statement was somehow recorded); *see also* R. 143:140-59 (Kaer's testimony)). In addition, both Copper and Britnee were on drugs when they talked to Kaer. (R. 143:67-68, 75-76; 143:88, 91, 95); *People v. Washington*, 486 N.Y.S.2d 660, 662-63 (N.Y. Sup. 1985) (ruling that intoxication may impair a defendant's ability to understand circumstances of the interrogation). Both were treated initially as suspects in the car theft. (*See* R. 1-3 (charging Britnee); 143:80 (Copper stating she was a suspect)). Thus, under the law, their statements inculpating Zaelit specifically "lack[ed] trustworthiness." *State v. Drawn*, 791 P.2d 890, 894 (Utah Ct. App. 1990).

Moreover, both had additional motives for falsely implicating Zaelit in the theft. According to Copper, she made the statements because she would have said anything to get out of the interrogation room at the police department. (R. 143:74; *see also* R. 143:80, 81). And Britnee told police that Zaelit was in the stolen car, but that was not true. (R. 143:90 (stating she told police he was in the car, but "I don't remember him being in the car")). She fabricated statements because she and Zaelit were in a fight that night. (R. 143: 85-86, 90). She was angry at him and wanted to get him in trouble. (R. 143:92, 94, 100, 102).

The evidence fails to support that the prior statements were spontaneous, under oath, subject to cross examination, or made in the presence of an attorney. (R. 143:40-59). Rather, they were made under the pressure of a police interrogation. (*See* R. 143: 140-59 (Kaer's testimony)); *Mauchley*, 2003 UT 10, ¶ 52 (discussing factors to consider in assessing credibility of an out-of-court statement); *Scott*, 2008 UT App 370, ¶ 10 (same); *Webster*, 2001 UT App 238, ¶ 27 (identifying factors to consider for reliability).

Although Kaer claimed that Copper and Britnee were "honest" in the interview, "right down to the drugs" they used (R. 143:150), the index of reliability here is very low. The available information fails to support their character for honesty or the reliability of the prior out-of-court statements under the exacting standard for a criminal conviction. (*See, e.g.*, R. 143:155 (Kaer acknowledging that people lie to police); R. 143:153 (Kaer acknowledging that Copper may not have specified which drugs she used); 143:149-50, 153 (reflecting that Britnee lied to Kaer; also, she was honest about the drugs she used because officers found drugs in her possession)); *see also* *Mauchley*, 2003 UT 10, ¶ 52 (discussing factors to consider for credibility of out-of-court statements); *Webster*, 2001 UT App 238, ¶ 27 (identifying factors to consider for reliability); *Moore*, 485 So.2d at 1280-82 (stating where two witnesses recanted prior statements implicating defendant, prior statements would not support a murder conviction beyond a reasonable doubt). The out-of-court statements lacked credibility and corroboration for purposes of the sufficiency standard. (*See supra*, Arg. A(2)).

The Evidence Supports that Justin Was the Only Person Involved in the Theft.

Based on the undisputed evidence here, Justin possessed the stolen car. (R. 143:90-91, 101 (Britnee testified she saw Justin in the car); *see also* R. 143:106, 109-10, 116, 118, 119 (Justin admitted he was the only person to steal the car)). He acted alone. (R. 143:119). Justin drove the car to the trailer home. (R. 143:107-08). He removed the license plate(s). (R. 143:111-12). He had an opportunity to put things in the car or remove things that did not belong to him. (R. 143:90-91). He put the license plate(s) in or on a car in Shauna Green's carport. (R. 143:124, 157). In addition, Green refused to

let officers search her trailer, and she would have had the opportunity to move the license plate(s) to a bedroom before officers searched the trailer. (*See* R. 143:157-58).

Notwithstanding the evidence, the State pursued a conviction against Zaelit because he was the only person who refused to cooperate with police. (*See* R. 143:196 (stating the three other witnesses were interviewed, but the fourth "wouldn't say anything")). In fact, the prosecutor summed up his case with an analogy involving four cats and a mouse in a box. (R. 143:196). According to the analogy, the mouse went missing. Consequently, agents interviewed the four cats: "There were four cats in the box with that mouse and they interviewed each of those cats and three of the cats told them exactly what happened. The other cat [Zaelit] wouldn't say anything but I'm suggesting to you that those statements made by those three witnesses are reliable and they're consistent with one another and they're very accurate. And I'm convinced that you as jurors are capable of making that decision, that determination about the witnesses and the truth of that." (R. 143:196-97).

The evidence in this case supports that four witnesses were confronted about the stolen car at a trailer where they spent the night. (*See, e.g.*, R. 143:182 (identifying all four individuals as "suspects" when they were found); 143:195 (stating "these four people were involved" and they "all did different things")). When Justin was confronted, he made out-of-court statements that were erratic and in response to Olive's trickery. (*See supra*, page 26). At trial, he made sworn statements that were consistent with testimony from other witnesses and the evidence. (*See, e.g.*, R. 143:90-91 (Britnee saw Justin in the car)). Also, Britnee and Copper made out-of-court statements to shift the

blame and the focus from themselves to Zaelit. (*See* R. 143:144-45, 148-49). Their out-of-court statements "lack[ed] trustworthiness." *Drawn*, 791 P.2d at 894.

Indeed, there is no credible or corroborating evidence to support the out-of-court statements. *Ramsey*, 782 P.2d at 484 (stating a verdict based on an out-of-court statement that a declarant recants is insufficient, unless the statement is corroborated; and citing Utah cases); *C.L.*, No. 20040037, 2005 UT App 221, *1-2 (unpublished); *see also Robbins*, 2009 UT 23, ¶¶ 16, 19 (recognizing that the criminal standard for a verdict is more exacting than the civil standard; also stating a court may reevaluate a jury verdict where "(1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt"); (*supra*, Arg. A.(2), herein).

The remaining evidence gives rise to "speculative possibilities of guilt," *Brown*, 948 P.2d at 344, and "inference upon assumption." *Layman*, 953 P.2d at 791. It requires the jury to take "speculative leaps across gaps in the evidence." *Gonzales*, 2000 UT App 136, ¶ 10. And it supports that Zaelit merely associated with Justin sometime before and after the theft. (*See, e.g.*, R. 143:107). That is not enough. "'Mere presence, or even prior knowledge, does not make one an accomplice to a crime absent evidence showing – beyond a reasonable doubt – that [a] defendant advised, instigated, encouraged, or assisted in perpet[r]ation of the crime.'" *M.B.*, 2008 UT App 433, ¶ 8 (citation omitted); *V.T.*, 2000 UT App 189, ¶¶ 19-20 (stating evidence was insufficient to support defendant's involvement in the theft where he was merely present during the crime); *see also Dyett*, 199 P.2d at 157 (stating if the prosecution has not presented evidence directly connecting the defendant to the theft, possession must be personal, conscious and

exclusive; "the mere association of a defendant with property recently stolen is insufficient"); *Brooks*, 126 P.2d at 1046 (stating receipt of recently stolen property requires proof of conscious possession); *Kinsey*, 295 P. at 249 (stating "possession must not only be personal, exclusive, and unexplained, but must also be conscious, or a conscious assertion of possession by the accused"); *Morris*, 262 P. at 110-11 (recognizing that for criminal liability, defendant must have personal and exclusive possession of the recently stolen property). The conviction should be reversed.

D. THIS COURT MAY CONSIDER THE SUFFICIENCY ISSUE UNDER THE PLAIN-ERROR DOCTRINE.

In *State v. Holgate*, 2000 UT 74, 10 P.3d 346, the Utah Supreme Court considered whether a defendant must specifically move to dismiss a charge in the trial court to preserve a sufficiency issue for appeal. The court stated, "As a general rule, claims not raised before the trial court may not be raised on appeal." *Id.* at ¶ 11. Also, "the preservation rule applies to every claim, including constitutional questions, unless a defendant can demonstrate that 'exceptional circumstances' exist or 'plain error' occurred." *Id.*

The court in *Holgate* specified that the preservation rule serves two purposes. First, "'in the interest of orderly procedure, the trial court ought to be given an opportunity to address a claimed error and, if appropriate, correct it.'" *Id.* (cite omitted). Second, the defendant "should not be permitted to forego making an objection with the strategy of 'enhanc[ing] the defendant's chances of acquittal and then, if that strategy fails, . . . claim[ing] on appeal that the Court should reverse.'" *Id.* (cite omitted).

The Court here may decide the sufficiency issue under the plain-error doctrine.

> The plain error exception enables the appellate court to "balance the need for procedural regularity with the demands of fairness." State v. Verde, 770 P.2d 116, 122 n.12 (Utah 1989). "At bottom, the plain error rule's purpose is to permit us to avoid injustice." [State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah 1989).] To demonstrate plain error, a defendant must establish that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined." Dunn, 850 P.2d at 1208-09.

Holgate, 2000 UT 74, ¶ 13.

The first prong of plain error is met based on a review of the record. Specifically, competent evidence fails to support that Zaelit received, retained, or disposed of stolen property, or concealed, sold or withheld it either directly or as an accomplice. (See supra, Args. A.(2), and C., herein); Utah Code Ann. § 76-6-408(1) (defining receipt of stolen property); Utah Code Ann. § 76-2-202 (defining accomplice liability); In re M.B., 2008 UT App 433, ¶ 7 (discussing accomplice liability). Rather, the verdict is based on uncorroborated, unreliable, unsworn, out-of-court statements. (See supra, Arg. C., herein). That is insufficient under Utah law. See Ramsey, 782 P.2d at 484 (citing Utah cases); C.L., No. 20040037, 2005 UT App 221, *1-2 (unpublished); Robbins, 2009 UT 23, ¶¶ 16, 19, 22-23; (supra, Arg. A.(2)). Thus, error exists.

Under the second prong of the analysis, the error should have been obvious to the trial court: The trial court is charged with knowing the law and applying it. See Utah Code of Judicial Conduct, Canon 3.B.(2) (2009) (stating a judge shall apply the law and maintain professional competence). In this case, the law applicable to the charge was available and should have been obvious to the court. (See supra, Arg. A. (reciting Utah law relating to the sufficiency of the evidence and out-of-court statements); Arg. B.

(reciting Utah law for receipt of stolen property)).

In addition, the trial court presided over the trial. (R. 143). Thus, the facts would have been obvious to the trial court. (*See* R. 143 (reflecting active participation in the trial by the court); *see also supra* Arg. C. (discussing evidence)). Where the facts and the law would have been obvious to the trial court, it was error for the court to allow the charge for theft by receiving stolen property to go to the jury; indeed, the charge was based solely on uncorroborated, unreliable, unsworn, out-of-court statements. (*See supra*, Arg. C., herein); *see also* Utah Code Ann. § 77-17-3 (2008) (stating when it appears to the court that the evidence is insufficient to put a defendant to his defense, the court shall order him to be discharged); *Holgate*, 2000 UT 74, ¶ 17.

With respect to the prejudice prong for plain error, where evidence is insufficient, the conviction is erroneous and the verdict is not sustainable. Prejudice is self-evident: Zaelit has been unjustly convicted of a felony offense based on unreliable, uncorroborated, inadequate evidence. (*See supra*, Arg. C., herein). To ensure that the verdict is not unlawful, this Court should review Zaelit's claim of insufficient evidence.

This Court may reach the merits of Zaelit's sufficiency claim under the plain-error analysis. The interests identified in *Holgate* are served. *See Holgate*, 2000 UT 74, ¶ 11 (stating a trial court "ought to be given an opportunity to address a claimed error and, if appropriate, correct it"; and a defendant should not be allowed to forego an objection to enhance his strategy if he is convicted). Specifically, the error here was obvious and fundamental. (*See supra*, Args. A(2), and C., herein). Thus, it should have been apparent to the trial court that the charge could not be supported under the law. (*See supra*, Args.

A.(2), and C.) Since the error was obvious, the trial court should have addressed it at trial and corrected it. *See also* Utah Code Ann. § 77-17-3.

In addition, Zaelit has not realized any benefit by foregoing an objection to the insufficient evidence in the trial court. If anything, the delay has been to Zaelit's detriment. He has been sentenced to prison for the offense even where the evidence is insufficient. The lack of an objection in the trial court and in the context raised on appeal has not enhanced Zaelit's chances of prevailing on appeal; rather, it has forced him to raise the issue under the plain-error doctrine, and it has served to delay a decision that should have been made in the trial court. Where this Court is able to review the record and apply the law, it may consider the sufficiency claim here for the first time on appeal.

CONCLUSION

For the reasons set forth herein, Appellant Zachary Zaelit respectfully requests that this Court reverse the conviction in this case for insufficient evidence.

SUBMITTED this 17th day of August, 2009.

Linda M. Jones
Heather Chesnut
Salt Lake Legal Defender Assoc.
Attorneys for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Linda M. Jones, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 4 copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 27th day of August, 2009.

LINDA M. JONES

DELIVERED to the Utah Attorney General's Office and the Utah Court of Appeals as indicated above this __ day of August, 2009.

_____

Tab A

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.
I, the undersigned, Clerk of the Third District Court, State of Utah, Salt Lake County, West Jordan Department, do hereby certify that the foregoing is a true and correct copy of the original document on file in this office
Witness my hand and seal of said court this 20 day of [illegible]
CLERK
THIRD DISTRICT COURT WEST JORDAN

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 081401776 FS
ZACHERY DON ZAELIT, Defendant.	:	Judge: STEPHEN ROTH Date: April 14, 2009

PRESENT
Clerk: debbiem
Prosecutor: HAMILTON, TYSON V
Defendant
Defendant's Attorney(s): CHESNUT, HEATHER J

DEFENDANT INFORMATION
Date of birth: May 31, 1978
Audio
Tape Number: 9045 Tape Count: 12:20

CHARGES
1. THEFT BY RECEIVING STOLEN PROPERTY - 2nd Degree Felony
Plea: Not Guilty - Disposition: 02/25/2009 Guilty

HEARING

TAPE: 9045 COUNT: 12:20
On Record: Matrix was done for different person under different offense. Court rec'd and read letter from deft's grand parents in court.

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 081401776
Date: Apr 14, 2009

ALSO KNOWN AS (AKA) NOTE

ZACH ZEELIT

SENTENCE ENHANCEMENT NOTE
Court recommends CTS.

Date: 4-14-09

STATE OF UTAH
THIRD DISTRICT COURT
WEST JORDAN

STEVEN ROTH
District Court Judge

Tab B

UTAH CODE ANN. § 76-2-202 (2008)

§ 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

CREDIT(S)

Laws 1973, c. 196, § 76-2-202.

UTAH CODE ANN. § 76-6-408 (2008)

§ 76-6-408. Receiving stolen property--Duties of pawnbrokers

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the **receiving** offense charged; or

(c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one positive form of identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Dealer" means a person in the business of buying or selling goods.

(b) "Pawnbroker" means a person who:

(i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;

(ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or

(iii) receives personal property in exchange for money or in trade for other personal property.

(c) "Receives" means acquiring possession, control, or title or lending on the security of the property.

CREDIT(S)

Laws 1973, c. 196, § **76-6-408**; Laws 1979, c. 71, § 1; Laws 1993, c. 102, § 1; Laws 2004, c. 299, § 16, eff. Jan. 1, 2005.

UTAH R. EVID. 801 (2009)

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is (A) inconsistent with the declarant's testimony or the witness denies having made the statement or has forgotten, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

CREDIT(S)

[Amended effective October 1, 1992.]

Tab C

--- P 3d ----, 2009 WL 2393096 (Mont.), 2009 MT 256
(Cite as: 2009 WL 2393096 (Mont.))

Supreme Court of Montana.
STATE of Montana, Plaintiff and Appellee,
v.
Christopher William WAGNER, Defendant and Appellant.
No. DA 08-0495.

Submitted on Briefs June 9, 2009.
Decided Aug. 4, 2009.

Background: Following a jury trial, defendant was convicted in the District Court, Eighteenth Judicial District, County of Gallatin, John C. Brown, J., of attempted deliberate homicide with a weapon. Defendant appealed.

Holdings: The Supreme Court, Mike McGrath, C.J., held that:
(1) common law plain error doctrine would be applied, and
(2) prosecutor's repeated comments at trial regarding statements defendant made after invoking his *Miranda* rights during police interview created inference of guilt that constituted plain error.

Reversed and remanded.

Jim Rice, J., filed dissenting opinion.

APPEAL FROM: District Court of the Eighteenth Judicial District, In and For the County of Gallatin, Cause No. DC-07-97C, Honorable John C. Brown, Presiding Judge.For Appellant: Jim Wheelis, Chief Appellate Defender; Koan Mercer, Assistant Appellate Defender, Helena, Montana.

For Appellee: Hon. Steve Bullock, Montana Attorney General; Mark W. Mattioli, Assistant Attorney General, Helena, Montana, Marty Lambert, Gallatin County Attorney; Todd Whipple, Deputy County Attorney, Bozeman, Montana.

Chief Justice MIKE McGRATH delivered the Opinion of the Court.

*1 ¶ 1 Christopher William Wagner (Wagner) appeals from a jury verdict, judgment and sentence of the Eighteenth Judicial District Court, Gallatin County, convicting him of attempted deliberate homicide with a weapon. We reverse and remand for a new trial.

¶ 2 The sole issue on appeal is whether the prosecutor's repeated comments at trial regarding statements Wagner made after invoking his *Miranda* rights created an inference of guilt that constituted plain error.

BACKGROUND

¶ 3 This case arises from a gun fight in which Wagner and Michael Peters (Peters) shot each other. Peters dated Melo-

dy Lark (Lark) from 1996 through 2000 in Bozeman, and they remained friends afterwards. Lark dated Wagner in Colorado for about four months in the summer of 2004, and then after travelling for a few months, she lived with Wagner for about five months. The relationship deteriorated while they lived together. Lark began to fear Wagner because he was often angry, paranoid, under the influence of methamphetamine, shot guns around his property, and discussed harming himself or others. Eventually Lark ended the relationship and moved out.

¶ 4 Lark testified that Wagner assaulted her the evening of October 8, 2005, after their relationship had ended. Wagner approached her from behind and knocked her out. She woke up outside with her head and ears bleeding. She went inside, but Wagner was there and took her phones away when she tried to call for help. Wagner eventually agreed to take her to a friend's house. Lark was later diagnosed with a skull fracture and traumatic brain injury. The doctor reported that her head injury was caused by an instrument hitting her head three or more times. Peters flew to Denver to visit Lark in the hospital following the assault.

¶ 5 The State of Colorado filed felony assault charges against Wagner. While the charges were pending, Wagner was released on bail with a GPS tracker around his ankle. Wagner removed the GPS tracker and fled Colorado.

¶ 6 Wagner came to Montana where he went by the name Curt Warren (and other aliases) and told people that his pregnant wife had died in a car accident. In early January 2007, Wagner hired a private investigator to find Peters' address. The investigator provided three addresses in Bozeman. About January 11, 2007, Wagner went looking for Peters at his home. Peters' father, John, answered the door and told Wagner that Peters was not home. Wagner told John to tell Peters that his friend, Jim, was passing through town. When John asked where he was from, Wagner hesitated before replying Kalispell. John thought that it was unusual that the man, who looked like a vagrant, had walked to his house on a very cold day. Later John recounted the incident to Peters, who did not know a Jim from Kalispell. Peters became concerned that the visitor was Wagner. Peters was afraid due to Wagner's attack on Lark and a previous assault when Wagner had beaten and stabbed an ex-girlfriend's boyfriend. Peters renewed his concealed weapons permit and asked Lark to email him a picture of Wagner. Peters' father could not positively confirm from the picture whether the man who had visited was Wagner.

*2 ¶ 7 On January 17, 2007, Peters left his house around noon. As he started to drive away in his truck, Peters noticed a person walking down the street towards him. The man flagged Peters down and he rolled down the window to talk. The man asked Peters if he had seen a little white dog, but then pulled a gun on him. Peters figured that the man must be

--- P 3d ----, 2009 WL 2393096 (Mont), 2009 MT 256
(Cite as: 2009 WL 2393096 (Mont.))

Wagner, whom he viewed as a "deadly person" intending to kill or torture him. Wagner ordered Peters to scoot over. Peters began to do so, but when Wagner grabbed the door handle, Peters shot at him. Peters fired two shots, which hit Wagner in the chest, before his gun jammed. Wagner then fired at Peters, hitting him three times: grazing his cheek, piercing his abdomen, and puncturing his hand. Peters escaped out the passenger door and ran into his house. His father called 911, but Wagner had fled by the time the police arrived. Peters willingly told the police what occurred.

¶ 8 At trial, Wagner provided a different version of events. Wagner claims he sought Peters in order to help him reconnect with Lark. Wagner testified that he returned to Peters' house to find out whether the older man he had spoken with before could give him any information on how to contact Peters. As he approached the house, Wagner noticed a truck back out of the driveway and drive towards him. Wagner claimed he gave a little wave to the driver and the truck stopped. According to Wagner, the driver then pointed a gun out the window and fired two shots at him. Wagner testified that when he shot back he was attempting to shoot the gun out of Peters' hand.

¶ 9 Although Wagner had been shot twice, he was able to walk away from the scene. Later Wagner asked a stranger for a ride. Wagner told the man that he had injured himself falling on the ice. Wagner got a ride to the Filling Station and then walked to a storage unit he had rented nearby. From there, Wagner called a friend who agreed to pick him up. Wagner told his friend that he had been stabbed in a bar that morning. Wagner tended to his wounds at his friend's apartment and then called another friend to pick him up. Wagner stayed with his friend in Ennis for a few days, then got a ride to Greybull, Wyoming, where he stayed with another acquaintance. Wagner was arrested in Greybull a few days later on January 25, 2007.

¶ 10 Detectives Cindy Crawford and Tom Pallach of the Gallatin County Sheriff's Office travelled to Greybull to interview Wagner as part of their investigation of the shooting. The detectives met with Wagner on January 26, 2007. After advising Wagner of his *Miranda* rights, Wagner indicated that he wanted to speak to a lawyer, saying that he didn't want to dig himself a deeper hole.

¶ 11 The prosecutor referenced this comment four times at Wagner's trial in May 2008. In his opening statement, the prosecutor said, "On January 26th, 2007, upon being interviewed by the police detectives, and asked whether he'd like to make a comment, he simply says, I don't want to dig myself a deeper hole." Then during the State's case-in-chief, the prosecutor asked Detective Crawford on direct examination whether Wagner made any statements or admissions after being advised of his *Miranda* rights. Crawford replied, "Mr. Wagner stated something to the effect where he wanted to speak to

an attorney first and he said, don't want to dig myself a deeper hole." Later the prosecutor ended his cross-examination of Wagner by questioning him regarding the statement:

*3 Q. Okay. When you were arrested, you told the Detectives that you didn't want to talk to 'em and dig yourself a deeper hole, right?

A. Yes.

Q. And today you explained that as nothing I was going to say was going to help you.

A. Yeah, there was no point of saying anything.

Q. No point in telling the story back in January of 2007?

A. It wasn't going to help change anything.

Q. So, 17 months, or 16 months later, this is when you tell this story today?

A. Yes.

Finally, in his closing argument, the prosecutor stated:

Somebody was right and somebody was wrong. So you have to choose who you believe. Do you believe Michael Peters who, from the very beginning, said, yeah, I shot this guy. I shot him first, and here's why. Or, do you believe the Defendant, who doesn't want to dig himself a deeper hole.

Wagner's counsel did not object to these repeated prosecutorial comments.

STANDARD OF REVIEW

[1][2] ¶ 12 This Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection was made, "where failing to review the claimed error may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process." *State v. Godfrey*, 2004 MT 197, ¶ 22, 322 Mont. 254, 95 P.3d 166 (citing *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996), *overruled on other grounds by State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817). We use our inherent power of common law plain error review sparingly. *Godfrey*, ¶ 22.

DISCUSSION

¶ 13 *Whether the prosecutor's repeated comments at trial regarding statements Wagner made after invoking his* Miranda *rights created an inference of guilt that constituted plain error.*

[3][4] ¶ 14 Since Wagner did not object to the prosecutor's repeated comments at trial, our review requires application of the common law plain error doctrine. Wagner argues that the prosecutor's

comments "leave unsettled the fundamental fairness of the trial" by impermissibly using Wagner's invocation of *Miranda* rights against him to attack his credibility and create an inference of guilt. Thus, Wagner claims that the State's repeated and deliberate use of his invocation of the right to silence warrants reversal under plain error review. We agree.

[5] ¶ 15 The United States Constitution's privilege against self-incrimination and right to due process prohibit the State from using a defendant's invocation of *Miranda* rights against him at trial. U.S. Const. amends. V, XIV. The United States Supreme Court described the privilege against self-incrimination as "the hallmark of our democracy," explaining that:

> the constitutional foundation underlying the privilege is the respect a government-state or federal-must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."

*4 *Miranda v. Arizona*, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620, 16 L.Ed.2d 694 (1966) (internal citations omitted). The Supreme Court required procedural safeguards, in the form of *Miranda* warnings, to protect these constitutional rights from the inherent coercion of custodial interrogation.

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Miranda, 384 U.S. at 467, 86 S.Ct. at 1624.

¶ 16 The Supreme Court held in *Doyle v. Ohio* that a prosecutor's impeachment use of a defendant's silence after receiving *Miranda* warnings was fundamentally unfair because *Miranda* warnings inform a person of his right to remain silent and assure him that his silence will not be used against him. 426 U.S. 610, 618-19, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976). The Supreme Court held that "the use for impeachment purposes of

petitioners' silence. at the time of arrest and after receiving Miranda warnings. violated the Due Process Clause of the Fourteenth Amendment." *Doyle,* 426 U.S. at 619, 96 S.Ct. at 2245. Underlying *Doyle* is the principle that *Miranda* warnings contain an implicit assurance that exercising *Miranda* rights will carry no penalty and that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Doyle,* 426 U.S. at 618, 96 S.Ct. at 2245.

[6] ¶ 17 This Court has held that *Doyle* error implicates fundamental constitutional rights that can warrant plain error review. *Godfrey,* ¶ 24; *State v Sullivan,* 280 Mont. 25, 32-33, 927 P.2d 1033, 1038 (1996); *Finley,* 276 Mont. at 138, 915 P.2d at 216. In the context of *Doyle* error, reversal under plain error review is appropriate when the Court is firmly convinced that the "prosecutor's comments created an inference for the jury that by remaining silent after receiving his rights, the defendant must be guilty of the alleged crime." *Godfrey,* ¶ 38; *see also Sullivan,* 280 Mont. at 36-37, 927 P.2d at 1040.

¶ 18 In *State v Sullivan,* this Court held that the prosecutor committed *Doyle* error when he commented on Sullivan's post-*Miranda* silence during the State's opening statement, case-in-chief. and closing argument. 280 Mont. at 35. 927 P.2d at 1039.

> We conclude that the four separate comments made in the State's opening statement. during the testimony of Detective Shaw, and during the State's closing argument regarding Sullivan's post-*Miranda* silence were not harmless beyond a reasonable doubt. These comments and testimony that Sullivan declined to give a statement to law enforcement officers after being advised of his *Miranda* rights violated Sullivan's right to due process. By making these comments, the State created an inference for the jury that, by remaining silent after having been read his rights. Sullivan was guilty of deliberate homicide.

***5** *Sullivan,* 280 Mont. at 36, 927 P.2d at 1039-40. The Court reversed based on this plain error. The facts here are similar to those in *Sullivan.* As in *Sullivan,* the prosecutor here used Wagner's post-*Miranda* silence in all phases of the trial: during his opening statement. his case-in-chief, his cross-examination of Wagner, and his closing argument.

[7] ¶ 19 Wagner invoked his *Miranda* rights when he requested to speak with an attorney. Detective Crawford testified that she was present when "Detective Palash [sic] read him his rights per Miranda, and Mr. Wagner stated something to the effect where he wanted to speak to an attorney first and he said, don't want to dig myself a deeper hole." This was an effective invocation of Wagner's *Miranda* rights. The United States Supreme Court has explained, "[w]ith respect to

post-*Miranda* warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Wainwright v. Greenfield*, 474 U.S. 284, 295 n. 13, 106 S.Ct. 634, 640 n. 13, 88 L.Ed.2d 623 (1986). In *Doyle*, the Supreme Court understood "silence" to include the defendant's response of "[w]hat's this all about?" *Doyle*, 426 U.S. at 614 n. 5, 96 S.Ct. at 2243 n. 5. Thus, Wagner's request to speak with an attorney and his comment that he didn't want to dig himself a deeper hole is a sufficient invocation of his right to remain silent.

¶ 20 The prosecutor used Wagner's post-*Miranda* silence to create an inference of guilt. The prosecutor relied on Wagner's failure to tell his version of events until trial as evidence of his guilt. On cross-examination, the prosecutor asked Wagner about his initial interview with the police:

Q. No point in telling the story back in January of 2007?

A. It wasn't going to help change anything.

Q. So, 17 months, or 16 months later, this is when you tell this story today?

A. Yes.

Clearly the prosecutor was overreaching. His questions were designed to create an inference that, by declining to give his version of events after invoking his *Miranda* rights, Wagner must be guilty. Further, the prosecutor implied that Wagner's post-*Miranda* statement that he didn't want to dig a deeper hole was an admission of guilt. The prosecutor ended his cross-examination of Wagner by enumerating the multiple lies that Wagner told people in his search for Peters and after the shooting. The prosecutor elicited at least 21 acknowledged lies told by Wagner. This line of questioning was sufficient to undermine Wagner's credibility in front of the jury. However, the prosecutor went too far by impermissibly implying that Wagner's failure to tell his story earlier or his comment about digging a deeper hole was evidence of his guilt.

¶ 21 This inference of guilt caused actual prejudice to Wagner constituting plain error.

A fundamental aspect of "plain error," is that the alleged error indeed must be "plain." In a case such as this, it should leave one firmly convinced, as we were in *Sullivan*, that the prosecutor's comments created an inference for the jury that by remaining silent after receiving his rights, the defendant must be guilty of the alleged crime.

*6 *Godfrey*, ¶ 38. Thus, we hold that the prosecutor's conduct raises questions regarding the fundamental fairness of the trial by violating Wagner's constitutional right to due process and privilege against

self-incrimination.

¶ 22 Reversed and remanded for a new trial consistent with this opinion.

We concur: JAMES C. NELSON, PATRICIA O. COTTER, W. WILLIAM LEAPHART, JOHN WARNER, and BRIAN MORRIS.
Justice JIM RICE, dissenting.
¶ 23 We exercise plain error review "when failure to do so may result in a manifest miscarriage of justice, leave unsettled the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Lacey*, 2009 MT 62, ¶ 74, 349 Mont. 371, 204 P.3d 1192 (citation omitted). I do not believe these reasons exist here.

¶ 24 I would affirm on the basis of the case explanation given by the Court in ¶¶ 3-9. The Court cannot even explain the facts of this case without exposing Wagner's ludicrous tale of lies, such as his telling a friend after the shooting incident that "he had been stabbed in a bar that morning." *Opinion*, ¶ 9. The jury did not believe, and no jury would, Wagner's claim that, while on the run from the law, he loaded a gun and went to Peters' house simply "to find out whether the older man he had spoken with before could give him any information on how to contact Peters," particularly given Wagner's history of sadistic and vengeful violence toward his victims. *Opinion*, ¶ 8.

¶ 25 Wagner sat by idly and failed to object while the prosecutor made multiple references to the comment he now challenges. Had he brought the issue to the District Court's attention by making a single objection, the court could have sustained the objection and instructed the jury about the comment. Wagner now gets the benefit of his own inaction, perhaps a strategy he purposefully employed. Regardless, a new trial should not be his reward in light of the overwhelming evidence against him. No "miscarriage of justice" occurred here for which plain error review is necessary. While victims must sometimes be inconvenienced by a re-trial so that the integrity of the judicial process can be preserved, the only "miscarriage of justice" in this case is putting the victims through the trauma of a second showing of Wagner's utterly unbelievable assertions.

¶ 26 I would not grant plain error review, and would affirm.

Mont.,2009.
State v. Wagner
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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY,	:	
Plaintiff/Appellee,	:	
v.	:	
JAMES FRANCIS DENIER,	:	Case No. 20081057-CA
Defendant/Appellant.	:	Appellant is not incarcerated

BRIEF OF APPELLANT

Appeal from a judgment of conviction for violation of a protective order, a class A misdemeanor under Utah Code Ann. § 76-5-108 (2008), entered in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Robin W.Reese, presiding.

CHARITY SHREVE (10215)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 200
Salt Lake City, Utah 84111
Attorney for Defendant/Appellant

PADMA VEERU-COLLINGS
SALT LAKE CITY PROSECUTOR'S OFFICE
349 South 200 East, Suite 500
P.O. Box 145500
Salt Lake City, Utah 84114-5500
Attorney for Plaintiff/Appellee